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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

In re ROSE H., a Person Coming Under the
Juvenile Court Law.

MERCED COUNTY HUMAN SERVICES
AGENCY,

Plaintiff and Respondent,

v.

MARIA H.,

Defendant and Appellant.

F078273

(Super. Ct. No. 17JP00079A)

OPINION

APPEAL from orders of the Superior Court of Merced County. Donald J. Proietti,
Judge.

Carolyn S. Hurley, under appointment by the Court of Appeal, for Defendant and
Appellant.

James N. Fincher, County Counsel, and Maile C. Dunlap, Deputy County
Counsel, for Plaintiff and Respondent.

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INTRODUCTION

In this dependency case, Maria H. (mother), appeals the juvenile court's denial of her Welfare and Institutions Code section 388¹ petition to have her daughter, Rose H., returned to her after the termination of her family reunification services and subsequent termination of her parental rights. She contends the juvenile court abused its discretion in denying the section 388 petition because she had shown changed circumstances and that return to her was in Rose's best interest. She contends the juvenile court erred in terminating her parental rights without ruling on Rose's placement with the maternal grandparents. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND²

On July 11, 2017, the Merced County Human Services Agency (agency) filed a section 300 petition, alleging then one-month-old Rose came within the jurisdiction of the juvenile court under section 300, subdivision (b)(1), in that there was a substantial risk that Rose would suffer serious physical harm or illness as a result of the failure or inability of her parent to supervise or protect adequately or provide regular care for Rose due to mother's substance abuse.

Rose was born premature in May 2017. Mother reported using methamphetamine the morning Rose was born and that she had used heroin on a daily basis while pregnant. Two days after Rose was born, mother tested positive for heroin, methamphetamine, ecstasy, and methadone. Due to mother's inability and failure to obtain prenatal care due to her substance abuse, Rose experienced respiratory distress, eating difficulties, and mild withdrawal symptoms. On July 5, 2017, a nurse from the hospital where Rose was being

¹ All further statutory references are to the Welfare and Institutions Code.

² Presumed father is not a party to this appeal. We focus on facts relevant to mother and her appeal.

Pursuant to California Rules of Court, rule 8.90, we refer to certain persons by their first names and/or initials. No disrespect is intended.

treated reported she had concerns regarding Rose's discharge to mother's care. The nurse reported Rose required more care than a full-term infant and that mother had not demonstrated she is able to care for Rose due to lack of visitation and interaction with Rose.

On August 23, 2017, the juvenile court sustained the allegations in the agency's section 300 petition. On September 6, 2017, the court ordered mother to participate in reunification services, including parenting education and substance abuse testing and counseling.

The social worker's six-month review report filed February 7, 2018, recommended termination of reunification services. With regard to mother, the social worker reported mother was not in compliance with any component of her case plan. Mother had not demonstrated any progress in building a positive support system, had stated she was struggling with remaining sober and continued to use heroin. Mother had entered a drug treatment program on January 9, 2018, and checked out on January 12, 2018. Mother had been ordered to have weekly visits with Rose, but only attended a total of five visits during the reunification period. Mother stopped visiting in November 2017 because she had been informed a warrant was issued for her arrest and feared being arrested. She arrived at least 15 minutes late to almost every visit she did attend.

The six-month status review hearing was held on February 27, 2018. Mother told the social worker she would be present for the hearing but did not appear. The court terminated reunification services and set a section 366.26 hearing.

The social worker's section 366.26 report filed June 5, 2018, recommended termination of mother's parental rights. It was reported mother had one visit with Rose since reunification services were terminated. It was reported that Rose was doing well and that her foster parent wished to adopt her. Rose had been placed with her foster parent since August 25, 2017, and was attached to the foster parent.

On August 28, 2018, mother filed a section 388 petition requesting the court to change its order terminating reunification services and make an order returning Rose to her either on family maintenance or by full dismissal of the dependency case. Mother alleged she had become drug free by participating in services through Merced County Probation Department and Merced County Mental Health Department. She alleged participation in these programs enabled her to be a loving and capable parent for Rose. Attachments to the petition indicated she had been arrested on May 17, 2018, and had been participating in treatment programs as part of the “[d]rug court” program. She attached progress reports from Merced County Behavioral Health and Recovery Services from July 30, 2018, August 2, 2018, and August 16, 2018, indicating she was in compliance with treatment goals and program requirements. The August 16, 2018 report indicated she went to an out-of-county casino without probation permission and missed treatment the following day. This report also indicated she had 59 days clean and sober.

On September 20, 2018, the court held a hearing on mother’s section 388 petition. Mother’s family friend and “navigator” at Poverello House, Christina V., testified on mother’s behalf. Christina has a degree in social work and once struggled with substance abuse until graduating from the drug court program in 2010. Christina testified she has observed significant positive changes in mother due to mother’s participation in drug court.

Mother’s sister, F.H., also testified on behalf of mother. She testified she met Rose the Monday prior to the hearing during a visit with mother and their father. She testified that Rose seemed to know mother, and mother seemed to love Rose and was bonding with her during the visit.

Mother testified that though she did not participate in her case plan, she wanted to. She testified she had been on probation since August 2017 and struggled with complying with the terms and conditions of probation due to substance abuse. She was arrested in May 2018. While in custody, she voluntarily took classes in the topics of trauma,

parenting, social skills, and addiction. She was released from custody in June 2018 and since then had been participating in drug court, which requires participation in an 18-month drug treatment program. Mother said she was fully participating in the program and attended a group meeting every day. Mother testified she had 93 drug court days and 133 actual days of sobriety. She has visited Rose monthly, for a total of three times, since getting out of custody.

On cross-examination, mother testified she had used drugs on and off since she was about 16 years old. She was 34 years old at the time of the hearing. During that time, she had a period of sobriety of approximately three years. She relapsed in 2013 when a person she was in a relationship with was released from prison and they started using drugs together. She has been to jail approximately four times. She said her most recent time in jail affected her differently than the other times because it was the first time she had gotten involved in programs. Participation in the program is a condition of her current probation.

Mother testified she was living with her parents, her 28-year-old brother, and 15-year-old son. She testified when her son was born, she voluntarily had her parents take guardianship of her son. Because she was involved in an abusive relationship and had begun using drugs, she wanted her parents to be the legal guardians in case there was an emergency and she was unable to tend to it. Since her recent sobriety, she has been a better mother to her son. She spoke of a recent occasion where she advocated for him to get treatment for a sports injury. She thinks living with her parents is helping her be a better mother. She has learned a lot from the parenting classes she took while in custody and currently in drug court and feels she is capable of parenting Rose.

Counsel for the agency and the minor did not present evidence but argued against the granting of the petition. The court denied the petition. In explaining its ruling, the court questioned whether 133 days of sobriety was enough to constitute changed circumstances, noting mother was a chronic drug user who has gone through periods of

remission. The court also expressed concern that mother had not made an effort to get employed and had not offered any evidence to show she had a relapse prevention plan in place. The court also noticed mother was not even halfway through her 18-month program. The court pointed out that the only evidence offered that the proposed change was in the best interest of Rose, was that mother and Rose were blood relation and mother's family supported the return of Rose. The court questioned whether that was enough. The court noted that F.H.'s testimony that Rose appeared to bond with mother was a sign that Rose was well adjusted and doing well in her current placement. For these reasons, the court held the return of Rose to mother was not in Rose's best interest.

After making an inquiry into the grandparents' application for placement, which is discussed below, the court found that Rose was likely to be adopted and terminated the parental rights as to mother.

Mother filed a timely notice of appeal to the order denying her section 388 petition and the order terminating her parental rights.

DISCUSSION

I. Denial of Mother's Section 388 Petition

Mother contends the court erred by denying her section 388 petition requesting the court to change its order terminating reunification services and return Rose to mother.

"A juvenile court order may be changed, modified or set aside under section 388 if the petitioner establishes by a preponderance of the evidence that (1) new evidence or changed circumstances exist and (2) the proposed change would promote the best interests of the child. [Citation.] The parent bears the burden to show both a legitimate change of circumstances and that undoing the prior order would be in the best interest of the child." (*In re A.A.* (2012) 203 Cal.App.4th 597, 611–612.) Section 388 serves as an " 'escape mechanism' when parents complete a reformation in the short, final period after the termination of reunification services but before the actual termination of parental rights." (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 528.)

“Not every change in circumstance can justify modification of a prior order. [Citation.] . . . [T]he problem that initially brought the child within the dependency system must be removed or ameliorated. [Citation.] The change in circumstances or new evidence must be of such significant nature that it requires a setting aside or modification of the challenged order.” (*In re A.A.*, *supra*, 203 Cal.App.4th at p. 612.)

“After the termination of reunification services, the parents’ interest in the care, custody and companionship of the child are no longer paramount. Rather, at this point ‘the focus shifts to the needs of the child for permanency and stability.’ ” (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) “A court hearing a motion for change of placement at this stage of the proceedings must recognize this shift of focus in determining the ultimate question before it, that is, the best interests of the child.” (*Ibid.*) “ ‘A petition which alleges merely changing circumstances and would mean delaying the selection of a permanent home for a child to see if a parent . . . might be able to reunify at some future point, does not promote stability for the child or the child’s best interests.’ ” (*In re Mary G.* (2007) 151 Cal.App.4th 184, 206.) There is a rebuttable presumption that continued foster care is in the best interests of the child. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310.)

Though mother’s efforts at achieving sobriety are commendable, our role on review is limited. A section 388 petition is “ ‘committed to the sound discretion of the juvenile court, and the trial court’s ruling should not be disturbed on appeal unless an abuse of discretion is clearly established.’ ” (*In re A.R.* (2015) 235 Cal.App.4th 1102, 1116–1117.) We look to whether the juvenile court “ ‘[“]exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.’ ” (*In re Stephanie M.*, *supra*, 7 Cal.4th at pp. 318–319.) “ ‘The denial of a section 388 motion rarely merits reversal as an abuse of discretion.’ ” (*In re Daniel C.* (2006) 141 Cal.App.4th 1438, 1445.)

We conclude the court did not abuse its discretion by denying mother's petition. As for changed circumstances, though mother presented evidence she was doing well in her program, she had not completed it. She had used drugs on and off for nearly half her life, and her previous three-year period of sobriety was much longer than the 133 days she claimed at the time of the hearing. Though mother contended at the hearing that her current period of sobriety was different in that she had not utilized treatment programs before, the court was not required to accept mother's explanation. In *In re Kimberly F.*, *supra*, 56 Cal.App.4th at page 531, footnote 9, the appellate court noted, "It is the nature of addiction that one must be 'clean' for a much longer period than 120 days to show real reform." This is particularly true where the person has a history of clean periods and relapse. As the juvenile court pointed out, mother offered no evidence of a plan as to how she would handle relapse. The juvenile court acted within its discretion in determining mother had exhibited at most "changing" rather than "changed" circumstances.

As for whether Rose's return to mother was in Rose's best interests, mother's primary argument that the requested order would be in the best interest of Rose is that they are biologically related. Without more information, mother was unable to rebut the presumption that continued out-of-home placement was in the best interest of Rose. (See *In re Marilyn H.*, *supra*, 5 Cal.4th at p. 310.) "The presumption favoring natural parents by itself does not satisfy the best interests prong of section 388." (*In re Justice P.* (2004) 123 Cal.App.4th 181, 192.) Mother had very few visits with Rose throughout the reunification process. Even after her release from custody and abstinence from drugs, mother only had three visits with Rose. The grandparents only visited a couple of times, and F.H. visited once. Though there is evidence these were positive visits, Rose's foster parent was the only family Rose ever knew. Rose lived with her foster parent almost her entire life and had never lived with mother. The trial court made a reasonable inference in finding evidence of positive visits with her biological family was proof that Rose was

well adjusted and doing well in her placement. Granting mother's petition simply would not have promoted stability for Rose.

The court did not abuse its discretion by denying mother's section 388 petition.

II. Relative Placement Preference

A. Relevant Background

At the time of Rose's detention, mother identified to the social worker her mother and father ("grandmother" and "grandfather"; "grandparents," collectively) as possible placements for Rose. On August 9, 2017, mother gave the social worker the grandparents' phone numbers. On August 10, 2017, the social worker spoke with the grandfather, and he informed the social worker that he was going to discuss taking placement of Rose with the grandmother and call back. As of the writing of the jurisdiction/disposition report filed on August 17, 2017, the grandparents were still considering whether to take placement of Rose. On August 17, 2017, a "relative/NREFM"³ referral was sent to the Resource Family Approval (RFA) unit for the grandparents to be considered for placement.

On February 27, 2018 (the day reunification services were terminated), the juvenile court found that Rose's continued placement was necessary and appropriate.

In the section 366.26 report, filed June 5, 2018, it was reported that the grandparents were still in the process of being approved as a potential placement.

On June 6, 2018, the grandparents made their first appearance in court. At the hearing, mother's counsel mentioned that the grandparents still had a request for placement pending. The court noted that the report indicated the grandparents were in the process of being approved, and counsel for the agency told the court she would get a more detailed status update.

³ "NREFM" stands for Non-Related Extended Family Member.

On June 14, 2018, counsel for the agency gave the court the following information:

“[Grandparents’] application was received August 16[,] 2017. The [a]gency scheduled a [L]ive [S]can on September 5[,] 2017, and provided them with a checklist of verifications needed. On January 30[,] 2018, the social worker followed up with the grandparents to see about the verifications. [Grandfather] stated that he’ll get back to the social worker because he needs to talk with his wife and see if they still want to continue with the process. [¶] The social worker conducted a home assessment on February 16, 2018. The social worker got the verifications April 11[,] 2018, and now they are waiting for the next parenting training class to start.”

Counsel for mother stated, “Apparently there was some medical concerns on the part of the grandfather.” The court said, “Understood. All right. Thank you for that update. It sounds like it’s in process.”

On September 20, 2018, following the court’s ruling on mother’s section 388 petition, the court then stated that it would address the issue of Rose’s adoptability, and the court asked counsel for the status of consideration of Rose’s maternal grandparents for placement. Counsel for the agency repeated the information provided on June 14, 2018, adding that there were no concerns with the grandparents’ Live Scans. As of September 20, 2018, the grandparents were still waiting for the next parenting training classes to start. Counsel for the agency informed the court the maternal grandparents had only had one visit with Rose in the last year. Counsel also stated the agency was denying the grandparents’ application because mother resides with them.

The grandfather told the court he tried to contact the social worker many times but was not able to, and that was the reason he had not visited Rose. He said he has not taken any classes but was looking into the program. He also told the court there was a delay on his behalf in completing the process.

The court held an in-chambers conference with all the attorneys and social workers. The court subsequently stated on the record that the purpose of the conversation

was to determine what the current status is of the maternal grandparents' request for placement. The court said it got the information it needed and proceeded to find that Rose was likely to be adopted and terminated the parental rights as to mother. In so ruling, the court stated: "The Court in making this order does not intend by any of its findings or by its orders to identify the appropriate party or parties for adoption to adopt the child or for other placement, and the Court does not intend to bar the process as currently underway by the maternal grandparents who are seeking placement. I would encourage them to continue that process so the agency can complete its assessment." The court set a review date for March 4, 2019.

B. Analysis

Section 361.3 requires preferential consideration to a request by a relative of a child in a dependency case for placement. In determining whether placement with a relative is appropriate, the social worker and the court must consider several factors, including the best interest of the child and the appropriateness of the relative's home.⁴

⁴ Section 361.3 enumerates the following factors to be considered for relative placement: "(a) In any case in which a child is removed from the physical custody of his or her parents pursuant to Section 361, preferential consideration shall be given to a request by a relative of the child for placement of the child with the relative. . . . In determining whether placement with a relative is appropriate, the county social worker and court shall consider, but shall not be limited to, consideration of all the following factors: [¶] (1) The best interest of the child, including special physical, psychological, educational, medical, or emotional needs. [¶] (2) The wishes of the parent, the relative, and child, if appropriate. [¶] (3) The provisions of Part 6 (commencing with Section 7950) of Division 12 of the Family Code regarding relative placement. [¶] (4) Placement of siblings and half siblings in the same home, unless that placement is found to be contrary to the safety and well-being of any of the siblings, as provided in Section 16002. [¶] (5) The good moral character of the relative and any other adult living in the home, including whether any individual residing in the home has a prior history of violent criminal acts or has been responsible for acts of child abuse or neglect. [¶] (6) The nature and duration of the relationship between the child and the relative, and the relative's desire to care for, and to provide legal permanency for, the child if reunification is unsuccessful. [¶] (7) The ability of the relative to do the following: [¶] (A) Provide a safe, secure, and stable environment for the child. [¶] (B) Exercise proper and effective care and control of the child. [¶] (C) Provide a home and the necessities of life for the

Section 361.3 requires relatives to be assessed by the social worker according to the enumerated factors before placement is made, and this investigation is not to be considered as good cause for continuance of the dispositional hearing. (*Id.*, subd. (a)(8)(B).) Mother argues it was error for the court to terminate parental rights without making a ruling on Rose’s placement with the grandparents.

To the extent that mother is arguing the court made any error at the section 366.26 hearing, she has no standing. A parent *only* has standing to appeal an order concerning the dependent child’s placement if “the placement order’s reversal advances the parent’s argument against terminating parental rights.” (*In re K.C.* (2011) 52 Cal.4th 231, 238.) At the section 366.26 hearing, the juvenile court’s options are limited. The juvenile court must terminate parental rights if the child is found to be adoptable unless the parent proves by clear and convincing evidence a statutory exception applies. (§ 366.26.) Mother does not contend that Rose was not adoptable, nor that a statutory exception to adoption or terminating her parental rights applies. Thus, mother has no standing to appeal any placement decision made at the section 366.26 hearing, as it would have had no effect on her parental rights.

Mother argues she has standing because if Rose had been placed with her grandparents *before* the section 366.26 hearing, the court would have had the statutory option available to it at the section 366.26 hearing to order guardianship rather than adoption. (See *In re Esperanza C.* (2008) 165 Cal.App.4th 1042; *In re H.G.* (2006) 146 Cal.App.4th 1; e.g., § 366.26, subd. (c)(1)(A).) Mother runs into procedural issues on

child. [¶] (D) Protect the child from his or her parents. [¶] (E) Facilitate court-ordered reunification efforts with the parents. [¶] (F) Facilitate visitation with the child’s other relatives. [¶] (G) Facilitate implementation of all elements of the case plan. [¶] (H)(i) Provide legal permanence for the child if reunification fails. [¶] (ii) However, any finding made with respect to the factor considered pursuant to this subparagraph and pursuant to subparagraph (G) shall not be the sole basis for precluding preferential placement with a relative. [¶] (I) Arrange for appropriate and safe child care, as necessary. [¶] (8)(A) The safety of the relative’s home. . . .”

this front as well. One of the arguments mother advances is that Rose “could have” been placed with her grandparents in February 2018 after their home assessment. To this contention, we note our scope of review is limited. Section 395 provides that any order subsequent to a section 300 judgment is appealable as a final judgment would be. “ ‘ “A consequence of section 395 is that an unappealed disposition or postdisposition order is final and binding and may not be attacked on an appeal from a later appealable order.” [Citation.] This “waiver rule” holds “that an appellate court in a dependency proceeding may not inquire into the merits of a prior final appealable order,” even when the issues raised involve important constitutional and statutory rights.’ ” (*In re A.A.* (2016) 243 Cal.App.4th 1220, 1234.) Here, the court made a finding on February 27, 2018, that Rose’s placement was appropriate. This finding was appealable when made, but it was not appealed. Thus, it is now final, binding, and unchallengeable. Mother’s argument that Rose should have been placed with her grandparents in February 2018 is forfeited.

To the extent that mother has any standing and there is an appealable order or failure to act, we find nonetheless the court made no error. A juvenile court’s placement decisions are reviewed under the abuse of discretion standard; the court is given wide discretion and its determination will not be disturbed absent a manifest showing of abuse. (*In re Sabrina H.* (2007) 149 Cal.App.4th 1403, 1420–1421.)

After February 27, 2018, the court did not make any findings or orders regarding placement. Mother’s challenge is based on a contention that the court had a duty to make an independent placement decision regarding the grandparents’ placement application because “it appeared” the agency did not do enough to assist the grandparents to be approved for placement. She argues Rose “should have” been placed with her grandparents in April 2018, after they returned their “ ‘verifications’ ” to the social worker.

We can find no authority for mother’s position that requires the court to bypass the grandparents’ RFA process and make an independent assessment of the grandparents’

circumstances and/or order Rose be placed with them. Rather, to support her claim the court had a duty to independently assess the grandparents' circumstances, mother cites to *Cesar V. v. Superior Court* (2001) 91 Cal.App.4th 1023, where the agency *had denied* placement to the relative requesting placement. (*Id.* at pp. 1027–1028.) There, the appellate court held the juvenile court must make an independent judgment regarding an agency's placement decision as opposed to applying an abuse of discretion standard to the agency's decision. (*Id.* at p. 1033.) The present case is distinguishable because here, there was no decision for the juvenile court to review. The grandparents had not completed their application in order to be fully considered for placement, and the delay was due at least in part to them. The court was aware of the status of the grandparents' application and implicitly found the grandparents need to finish the RFA process before Rose can be placed with them.⁵ We find no manifest showing of abuse.

DISPOSITION

The juvenile court's orders are affirmed.

DE SANTOS, J.

WE CONCUR:

FRANSON, Acting P.J.

PEÑA, J.

⁵ At the section 366.26 hearing, counsel for the agency stated in open court the agency was denying the grandparents' application because mother lived with them. To the extent that mother is arguing the court had a duty to make an independent assessment into the grandparents' circumstances at that time, mother has no standing to make this claim, as discussed in this opinion. Nonetheless, there is no error because the court did not appear to accept this decision and encouraged the grandparents to finish the RFA process for possible future placement.